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No. 83-2052

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HANOCH TEL-OREN, in his capacity as father, on behalf of the deceased, IMRY TEL-OREN, *et al.*,
Petitioners,
v.
LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

HANOCH TEL-OREN, *et al.*,
Petitioners,
v.
LIBYAN ARAB REPUBLIC, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS HANOCH TEL-OREN, *ET AL.*

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Petitioners, Hanoch Tel-Oren, *et al.*, respectfully submit this Reply Brief in support of their prayer for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 3, 1984.

STATUTORY PROVISIONS INVOLVED

D.C. Code Ann. § 12-301 provides:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified

below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments—15 years;

(2) for the recovery of personal property or damages for its unlawful detention—3 years;

(3) for the recovery of damages for an injury to real or personal property—3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year;

(5) for a statutory penalty or forfeiture—1 year;

(6) on an executor's or administrator's bond—5 years; on any other bond or single bill, covenant, or other instrument under seal—12 years;

(7) on a simple contract, express or implied—3 years;

(8) for which a limitation is not otherwise specially prescribed—3 years;

(9) for a violation of the District of Columbia Mental Health Information Act of 1978 (D.C. Code, sec. 6-1611 [6-2001] et seq.)—1 year.

This section does not apply to actions for breach of contracts for sale governed by § 28:2-725.

D.C. Code Ann. § 12-302 provides:

(a) Except as provided by subsection (b) of this section, when a person entitled to maintain an action is, at the time the right of action accrues:

(1) under 18 years of age; or

(2) noncompos mentis; or

(3) imprisoned—

he or his proper representative may bring action within the time limited after the disability is removed.

> (b) When a person entitled to maintain an action for the recovery of lands, tenements, or hereditaments, or upon an instrument under seal, is under any of the disabilities specified by subsection (a) of this section at the time the right of action accrues, he or his proper representative, except where otherwise specified herein, may bring the action within 5 years after the disability is removed, and not thereafter.

ARGUMENT

In its Brief in Opposition to the Petition for a Writ of Certiorari ("Respondent's Brief"), respondent has seriously distorted and mischaracterized the decision below of the United States Court of Appeals for the District of Columbia Circuit. On the one hand, respondent asserts that the Court of Appeals' two-page *per curiam* statement constitutes the court's entire decision, and that the three concurring opinions, totalling one hundred fourteen (114) pages, constitute "mere *dicta*." Respondent's Brief at 5. At the same time, however, respondent cites at least one of the concurring opinions as expressing the "ruling" of the Court of Appeals. *See, e.g., id.* at 16. Thus, respondent presents two inconsistent versions of the lower court's decision, relying on the concurrences when they support respondent's argument and dismissing them as *dicta* when they do not. Furthermore, respondent contends that the Court of Appeals ruled on two issues—the statute of limitations and insubstantiality claims—which it did not in fact reach in rendering its decision.

Respondent raises a total of six arguments which, it contends, preclude review by this Court. While all of these claims are without merit, the statute of limitations and insubstantiality issues are discussed herein in order to clarify their status below and demonstrate the lack of foundation for respondent's arguments relating thereto.

Respondent's initial argument in opposition to the Petition for a Writ of Certiorari is that the "courts below,"

Respondent's Brief at 8, properly dismissed the Complaint as time-barred by the one-year statute of limitations set forth in D.C. Code Ann. § 12-301(4). Respondent contends that the District Court's ruling on the statute of limitations issue was "specifically referred to" by the Court of Appeals, *id.* at 9, that it "was not disturbed in any way" by the Court of Appeals, *id.*, and that it was therefore affirmed by the Court of Appeals. In addition, respondent asserts that petitioners have "virtually conceded that their action is barred by the statute of limitations . . . [because] the Petition contains not a single mention of the statute of limitations." *Id.* at 9-10.

Even a cursory examination of the Petition, the decision of the Court of Appeals and the relevant statute and case law reveals that respondent's contentions are without merit. First, the statute of limitations issue was, in fact, expressly referred to in the Petition, *see* Petition at 6 n.2, as petitioners stated that the District Court erred in finding their claims to be time-barred. Second, that issue, while part of the District Court's ruling, was not reached by the Court of Appeals. This fact was clearly acknowledged by Judge Bork, *see* App. IA at 53a n.2 (Bork, J., concurring), as well as by respondent, who concedes that "none of the three concurring opinions reached the issue." Respondent's Brief at 9. Indeed, had the Court of Appeals adopted the District Court's ruling on the limitations issue, as contended by respondent, surely it would not have devoted one hundred fourteen (114) pages to a discussion of the various substantive issues presented. Respondent suggests that the Court of Appeals' mere mention of the District Court's ruling on the limitations issue, *see* App. IA at 3a, constitutes an affirmation of that ruling. Such an interpretation, however, distorts the scope of the Court of Appeals' decision and contradicts Judge Bork's express statement to the contrary.

A third flaw in respondent's reasoning lies in its interpretation of the District of Columbia limitations statute.

Section 12-301(4) provides a one-year limitations period for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment." D.C. Code Ann. § 12-301(4). Section 12-301(8) mandates a three-year period where "a limitation is not otherwise specially prescribed" by the Code. D.C. Code Ann. § 12-301(8). The inclusion of this general provision evidences a clear legislative intent that the seven preceding sections, including section 12-301(4), are meant to apply only to the specific actions enumerated therein, and to no others.

Petitioners' claims for intentional infliction of emotional distress, for intentional infliction of cruel, inhuman and degrading treatment, and for the claims set forth in Counts II, III and V are governed by section 12-301(8), since they are not among those actions identified in section 12-301(4). Indeed, respondent's contention that such claims all arise out of an assault and thereby "do not state separate or distinct rights of action," Respondent's Brief at 8, is directly contrary to the statutory language noted above, general tort principles and binding case law.

The intentional infliction of emotional distress, for example, is recognized as an actionable tort, independent and distinct from the torts of assault and battery. *See* Prosser, *Law of Torts* (4th ed. 1971) § 12 at 56-59; Restatement (Second) of Torts § 46 comments a, k (1977). Comment a to the Restatement states this principle unequivocally:

> [T]he rule stated in this Section [dealing with outrageous conduct causing severe emotional distress] has been fully recognized as a *separate and distinct basis of tort liability*, without the presence of the elements necessary to any other tort, such as assault, battery, false imprisonment, trespass to land, or the like.

Respondent's statute of limitations argument is thus contrary to the Restatement of Torts. It is also directly

contradicted by the opinion of the United States Court of Appeals in *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). There, a federal employee, having resigned his position under false charges of homosexual conduct, brought suit alleging the torts of fraudulent misrepresentation, defamation of character, interference with economic advantage, intentional infliction of severe emotional distress and violation of the constitutional rights to privacy, due process and immunities of citizenship. Rather than treating these claims as one single action because they purportedly arose out of the same conduct, as respondent would have the Court do in the instant case, the D.C. Circuit found that plaintiff's claims were separate and independent and, therefore, governed by different limitations periods. The court, in a ruling indistinguishable from the instant case, held that the defamation claim was governed by the one-year period of section 12-301(4), and, significantly, that the allegation of intentional infliction of emotional distress was governed by the three-year period of section 12-301(8). *Id.* at 68 n.5.[1] *See also Fitzgerald v. Seamans*, 553 F.2d 220, 223 (D.C. Cir. 1977).

The reasoning adopted by Prosser, the Restatement and the *Richards* court fully applies to the case at bar. Petitioners have suffered severe and permanent emotional trauma as a result of observing the barbaric execution of loved ones and others during the March 11, 1978 attack, and experiencing the brutal torture and kidnapping inflicted by the Libyan-backed terrorists. The emotional distress engendered by such events is a compensable harm, wholly distinct from any bodily injury or apprehension of bodily injury which petitioners themselves suffered. Claims predicated upon that distress are governed,

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[1] The court presumably treated the defamation claim as one for libel and slander, actions specifically enumerated in section 12-301(4).

therefore, not by the limitations period for assault or battery but by the period set forth in section 12-301(8).

Even if respondent's argument concerning the applicability of section 12-301(4) is accepted, petitioners' lawsuit may still be maintained. Section 12-302 provides that when a person is under the age of eighteen when his cause of action accrues, "he or his proper representative may bring action within the time limited after the disability is removed." D.C. Code Ann. § 12-302. Since thirty-four of the persons killed or injured in the terrorist attack were under the age of eighteen when the attack occurred, and did not attain the age of eighteen prior to the filing of the Complaint, their claims cannot be time-barred, regardless of the statute of limitations found to be applicable. *See Canterbury v. Spence*, 464 F.2d 772, 793 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) ("[f]or one a minor when his cause of action accrues, they [the statutes of limitations] do not begin to run until he has attained his majority.").[2]

Respondent also contends that petitioners' allegations against it are conclusory and too insubstantial to state a cause of action, and asserts that the "courts below," Respondent's Brief at 10, properly dismissed the Complaint on this basis. This argument suffers from two principal defects.

First, the "courts below" did not, in fact, dismiss the Complaint on the basis that the allegations against respondent are insubstantial. While insubstantiality served as a premise for the District Court's ruling, that issue, like the statute of limitations question, was never reached by the Court of Appeals: "Nor need we reach the district court's dismissal of the action against the NAAA . . . on the ground that the allegations of the complaint were insufficiently specific." App. A at 53a n.2 (Bork,

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[2] Curiously, respondent completely ignores the claims of the minor petitioners in its statute of limitations discussion.

J., concurring). Respondent errs, therefore, in implying that the Court of Appeals affirmed dismissal because "none of the three concurring opinions questioned or disagreed with the insufficiency holding." Respondent's Brief at 11-12.

Second, petitioners' Complaint does far more than simply set forth conclusory allegations relating to respondent's participation in the terrorist attack. The Complaint asserts, for example, that respondent planned the terrorist operation, conspired with the other defendants to bring it about, raised funds and procured arms, boats, hand grenades and other equipment in furtherance of the operation. App. IIA at 19-20.[3]

Accordingly, petitioners' allegations are far more specific than those in the cases relied upon by respondent. In *Granville v. Hunt*, 411 F.2d 9 (5th Cir. 1969), for example, plaintiff, a Florida inmate, brought suit against corrections officials. With respect to his conspiracy claim, plaintiff alleged only that defendants "conspired against . . . [him] and that as a result of this conspiracy, he was subjected to cruel and unusual punishment." *Id.* at 11. The dismissal of plaintiff's complaint was affirmed on the ground that such allegations were conclusory and "fail[ed] 'to allege any overt acts related to the promotion of the claimed conspiracy.'" *Id.* (citation omitted).[4]

For the reasons set forth above and in the Petition, a writ of certiorari should issue to review the opinion and judgment of the District of Columbia Circuit.

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[3] These allegations, of course, are to be accepted as true in ruling on a motion to dismiss. *Miree v. Dekalb County, Georgia*, 433 U.S. 25, 27 n.2 (1977).

[4] The allegation of specific, additional facts concerning respondent's participation in the terrorist attack also distinguishes this action from *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972), relied upon by respondent.

Respectfully submitted,

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